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No. 97-1194

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN KENTUCKY RESOURCES, ET AL., PETITIONERS,

v.

THE FISCAL COURT OF MAGOFFIN COUNTY, ET AL.,
RESPONDENTS.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

Eastern Kentucky Resources, Blue Ash Development, Inc., and Royalton Resources, Inc. (collectively "EKR") have filed a Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit requesting that the Supreme Court review a decision of the United States Court of Appeals for the Sixth Circuit affirming a decision of the United States District Court for the Eastern District of Kentucky that upheld the constitutionality of Senate Bill 2 of the 1991 Kentucky General Assembly. Notwithstanding compelling reasons for

such review, the Respondents[1] object to the Petition, arguing, *inter alia*, that the decision turned on a question of fact, not constitutional law, and the Sixth Circuit has correctly applied Supreme Court precedents and the opinions of other Courts. The Respondents' objections are not well founded. As set forth more fully below, EKR has demonstrated adequate grounds for review and the importance of the issues involved. Because there are important constitutional and social policy considerations which should be reviewed by this Court, EKR respectfully requests that this Court grant the Petition.

I. The Overwhelming Merit Of The Petitioners' Challenge Warrants Issuance Of A Writ Of Certiorari.

The Respondents argue that EKR has petitioned this Court because it was unsuccessful in its attempt to site a solid waste landfill in Magoffin County, Kentucky. The Respondents then proceed to ignore the merits of EKR's claim.

In contrast, EKR has set forth significant reasons for the Supreme Court to grant EKR's Petition for a Writ of *Certiorari*. Most importantly, and as discussed more fully in the Petition, Senate Bill 2, in conjunction with the actions of the Magoffin County Fiscal Court, clearly violate the Commerce Clause both in intent and effect. Restrictions on the free flow of commerce because of out-of-state, or out-of-area, origins is an obvious violation of the Commerce Clause and must not be allowed to

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[1] The Respondents to the Petition include the Fiscal Court of Magoffin County, Kentucky, Paul E. Patton, in his capacity as Governor of the Commonwealth of Kentucky and James E. Bickford, in his capacity as Secretary of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky.

stand. This important constitutional issue should be decided by the Supreme Court.

The Supreme Court should also grant this Petition because the United States Court of Appeals for the Sixth Circuit rendered a decision which is in conflict with the precedent of the Supreme Court and of the United States Court of Appeals for the Eleventh Circuit. (Petition 16-18).

These factors fully satisfy the requirements of Rule 10(a) of the Rules of the Supreme Court of the United States ("United States SCR"). Moreover, the Petition fully satisfies the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1) and United States SCR 14.1(g)(ii).

II. The Burden Rests Upon The Respondents To Show That EKR Has Not Demonstrated The Fact Of Differential Treatment.

In its Petition, EKR set forth the legal framework to determine whether a state statute which burdens the free flow of interstate commerce violates the Commerce Clause. The first method of analysis is applied when a statute discriminates against interstate commerce either on its face or in practical effect. The Supreme Court has recognized a virtual *per se* rule invalidating any regulation which discriminates against interstate commerce on its face or in practical effect. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-623 (1978).

The second method of analysis considers apparently neutral regulations. This method of analysis states:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

> incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Respondents argue that while EKR charged that the Court of Appeals had erred in applying the *Pike* balancing test instead of the *per se test*, EKR has failed to carry its evidentiary burden demonstrating the existence of differential treatment. (Response 9).

The position taken by the Respondents is in contradiction to both the procedural stance of this case and the evidence that was made part of the record at trial.

This case was decided by the District Court on a Summary Judgment motion pursuant to Federal Rule of Civil Procedure 56. Summary Judgment may be granted as long as there are no genuine issues of material fact, and materiality is governed by the substantive law of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition, "[o]n a Motion for Summary Judgment, disputed issues of fact are resolved against the moving party." *General Electric Co. v. Joiner*, 118 S.Ct. 512, 517 (1997).

The authority of the Supreme Court is clear. The burden rests upon the Respondents to demonstrate that no material issue of fact exists. Instead, Respondents argue that the burden rests on EKR to demonstrate the existence of differential treatment. (Response 9).

Despite the fact that the burden rests upon the Respondents to show that no material issue of fact exists, EKR

has demonstrated that a material issue of fact indeed did exist. EKR does not ask the Supreme Court to review the evidence entered at trial, rather EKR respectfully requests the Supreme Court to review the legal conclusions made by the trial court and the Court of Appeals in light of this evidence. For the reasons set forth below, and in fuller detail in EKR's Petition, it is clear that the District Court and the Court of Appeals are both in error.

A. The Passage Of Statutes And Regulations With The Intent And The Effect Of Prohibiting Interstate Movement Of Goods Violates The Commerce Clause.

EKR demonstrated in its Petition that the passage of Senate Bill 2 and the actions of the Magoffin County Fiscal Court regarding EKR's proposed solid waste landfill were motivated by an intent to prohibit the flow of solid waste into the Commonwealth of Kentucky and Magoffin County. In addition, the acts of the General Assembly and the Magoffin County Fiscal Court have had the effect of preventing the free flow of out-of-state waste. Respondents argue that the opinions of former Governor Brereton Jones and County Judge Executive Charles Hardin are irrelevant as their actions occurred after the passage of Senate Bill 2. Yet, the Respondents' analysis misses the mark. There are two distinct levels at which the provisions of Senate Bill 2 violate the Commerce Clause.

At the first level is Senate Bill 2 itself. Senate Bill 2 was the result of recommendations arising from a study prepared by the University of Kentucky entitled, *Kentucky Solid Waste Management Study: Issues And Opinions*, September 17, 1990 (the "Solid Waste Study"). The Solid Waste Study provided the framework and most ably explains the motivations of the Kentucky Legislature in its passage of Senate Bill 2. As has

already been explained, the goal of stopping out-of-state solid waste was an essential theme of the Solid Waste Study.

Yet, examination of Senate Bill 2 and the history of its passage is only part of the picture. One must also understand the operation of Senate Bill 2 at the local level. Senate Bill 2 provides for local governmental units such as Magoffin County to design solid waste management plans that are approved at the state level by the Natural Resources and Environmental Protection Cabinet. As the Petition explains, public servants, from the Governor of the Commonwealth to candidates elected to the Magoffin County Fiscal Court, stated that their intent was to prevent the flow of out-of-state waste into the Commonwealth of Kentucky generally, and Magoffin County specifically. (Petition 9-10).

Because Senate Bill 2 provides an avenue for localities to discriminate against the free flow of out-of-state waste, it is in clear violation of the Commerce Clause.

Furthermore, the results of Senate Bill 2 and the actions of the Magoffin County Fiscal Court have affected the flow of out-of-state waste. Since the passage of Senate Bill 2, of the 118 solid waste management areas in the Commonwealth, at least 85 areas provide no capacity whatsoever for out-of-area (and thus out-of-state) waste in their Cabinet-approved area plans. Despite the additional restrictions on out-of-state waste, the Court of Appeals stated that EKR failed to demonstrate how local economic actors are favored at the expense of out-of-state economic actors. (Petition 12). This decision, holding that the challenged provisions of Senate Bill 2 do not discriminate against interstate commerce because they also discriminate against some in-state commerce is in clear conflict with the Supreme Court's decision in *Dean Milk v. Madison*, 340 U.S. 349 (1951), and other decisions of the Supreme Court which

stand for the principle that "it is immaterial" for purposes of determining whether the legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same prescription as that moving in interstate commerce." *Id.*, at 354.

For these reasons alone, the present dispute is worthy of the Supreme Court's consideration.

B. Senate Bill 2 Has Raised An Important Policy Issue That Must Be Resolved By The Supreme Court.

The greatest danger posed by Senate Bill 2 is that it invites local governmental units to engage in activities that are clearly prohibited by the Commerce Clause. If the decision below is allowed to stand, it will "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause" *Dean Milk*, 340 U.S. at 356, and will effectively subvert the principle which was reiterated in *Dean Milk*, that "one state in its dealings with another may not place itself in a position of economic isolation. *Baldwin v. Seelig, Inc.*, [294 U.S. 511] at 527." *Id.*, at 356.

While the Respondents never deal with this issue, allowing the decision below to stand invites every state in the Union to enact similar legislation to deal with solid waste. By doing so, each county and each state could adopt policies similar to those adopted by Magoffin County and effectively halt the movement of all solid waste across state and county lines. Given the grave consequences that would result, a Writ of *Certiorari* should issue to review the decision below.

CONCLUSION

It is clear that Senate Bill 2 violates the Commerce Clause in both its intent and effect. The Bill was motivated by a desire to retard the flow of solid waste into the Commonwealth of Kentucky. As the Petitioner has demonstrated, Senate Bill 2 has also had the effect of retarding the flow of solid waste into the Commonwealth of Kentucky. In addition, Senate Bill 2 invites other states to enact similar legislation allowing local governmental units to create barriers against the free flow of commerce. Finally, as the Petitioner has already demonstrated in its Petition, the holding below stands in clear conflict with the precedents of the Supreme Court and the United States Court of Appeals for the Eleventh Circuit. (Petition 16-18). For these reasons, a Writ of *Certiorari* should issue to review the decision below.

Respectfully submitted,

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